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IN THE

Supreme Court of the United States

October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND SEVENTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
CATHARINE F. HAUKEDAHL
Special Assistant
Attorney General
Counsel of Record
515 Transportation Bldg.
St. Paul, MN 55155
Telephone: (612) 296-6839
(Additional Attorneys General listed inside)

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

Attorneys General of Counsel

CHARLES A. GRADDICK
Attorney General
State of Alabama

ROBERT K. CORBIN
Attorney General
State of Arizona

JIM SMITH
Attorney General
State of Florida

MICHAEL A. LILLY
Attorney General
State of Hawaii

LINLEY E. PEARSON
Attorney General
State of Indiana

ROBERT T. STEPHEN
Attorney General
State of Kansas

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisana

STEPHEN H. SACHS
Attorney General
State of Maryland

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi

WILLIAM L. WEBSTER
Attorney General
State of Missouri

MIKE GREELY
Attorney General
State of Montana

STEPHEN E. MERRILL
Attorney General
State of New Hampshire

LEROY S. ZIMMERMAN
Attorney General
State of Pennsylvania

MARK MEIERHENRY
Attorney General
State of South Dakota

DAVID L. WILKINSON
Attorney General
State of Utah

GERALD L. BALILES
Attorney General
State of Virginia

A. G. McCLINTOCK
Attorney General
State of Wyoming

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STATEMENT OF INTEREST

The Amici States, through their attorneys general, respectfully offer this brief in support of the petition for a writ of certiorari. This case raises issues of considerable public importance, the resolution of which will directly impact the amici.

First, amici have a significant responsibility to ensure the health, safety and welfare of their citizens through law enforcement activities. This responsibility is carried out through both the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies

of other governmental units. Second, the states have, in varying degrees, responsibility for defending public officials subject to damage actions pursuant to 42 U.S.C. § 1983. Thus, amici are concerned with protecting public officials from monetary liability to the maximum extent provided by law.

Because of their interest in providing effective law enforcement and in protecting public officials from unwarranted liability, amici submit this brief in support of the petition.

SUMMARY OF ARGUMENT

The Court of Appeals' decision is inconsistent with this Court's principles regarding the functions of police officers and magistrates and with the policies underlying qualified immunity.

This Court has indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. *United States v. Leon,* 104 S. Ct. 3405 (1984). The Court of Appeals, however, has placed the burden of civil liability for an improper determination of probable cause on the police officer. The principles underlying this Court's decision in *Leon* suggest that the Court of Appeals' allocation of responsibility is erroneous.

Similarily, the policies underlying qualified immunity suggest that a police officer should be insulated from liability in the circumstances of this case. The social costs of excessive litigation prompted this Court to establish an objective standard for determining qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The rule proposed by Rhode Island in the instant matter is a logical application of *Harlow* to the peculiar difficulties raised by fourth amendment analysis and application.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRINCIPLES REGARDING THE FUNCTIONS OF POLICE OFFICERS AND MAGISTRATES.

This case presents the important and unresolved question of whether a police officer, who believes the facts in his affidavit to be true, and who submits the affidavit to a neutral and detached magistrate, can be held liable for damages under 42 U.S.C. § 1983 when it is subsequently determined that the facts recited in the affidavit did not constitute probable cause. The Court of Appeals for the First Circuit has approved liability in such circumstances. This ruling is inconsistent with this Court's principles regarding the functions of police officers and magistrates, especially as those principles are set forth in the recent case of *United States v. Leon*, 104 S. Ct. 3405 (1984).

In *Leon*, this Court indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. 104 S. Ct. at 3420-21. In placing this responsibility with the magistrate, the Court recognized that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause" and the Court thus accorded " 'great deference' to a magistrate's determination." 104 S. Ct. at 3417. The Court reiterated its acknowledgement of the differing roles of police officers and magistrates, the former being "engaged in the often competitive enterprise of ferreting out crime" and the latter providing "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches." 104 S. Ct. at 3416 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1971)).

Despite *Leon's* allocation of responsibility, the First Circuit has placed the burden of civil liability for an improper determination of probable cause on the police officer whenever the officer "should have known" that probable cause is lacking. *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984). In so holding, the First Circuit relies largely on its perception of the dangers of making a magistrate "the sole protector of the fourth amendment," that is, the dangers of encouraging "sloppy police work" and the danger that the magistrate will be ineffective in his scrutiny. 748 F.2d at 720.

However, as *Leon* itself suggests, it is questionable whether either of these anticipated dangers really exists. First, the proposition that placing responsibility on magistrates encourages sloppy police work assumes what the First Circuit makes explicit in its second conclusion, that magistrates are ineffective. This Court indicated that such an assumption simply cannot be made because

> there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . .

104 S. Ct. at 3418. Rather, the Court has recognized that

> limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications.

104 S. Ct. at 3419, n. 18.

Second, the First Circuit aparently assumes that a magistrate's review must either completely insulate an officer or cannot insulate him at all. If such insulation were complete under all circumstances, amici might agree that there would be no deterrent to police misconduct and "sloppy police work" would result. However, the magistrate cannot insulate the offi-

cer where the officer either knew that the information in the affidavit was false or acted in reckless disregard for the truth. 104 S. Ct. at 3421-22 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Thus, an ample deterrent remains to guard against officers' obtaining warrants in completely inappropriate situations.

The First Circuit's decision, when read with *Leon*, poses a difficult dilemma for law enforcement officers. For the purposes of a criminal proceeding, officers, under *Leon*, are encouraged to rely on a neutral and detached magistrate or judge for a determination of probable cause. However, if an officer engages in such reliance, he runs the risk of incurring civil liability under *Briggs v. Malley*, which places responsibility for determining probable cause back on the police. In order to resolve this dilemma, the Court should grant the petition for a writ of certiorari in this case.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE POLICIES UNDERLYING QUALIFIED IMMUNITY.

As this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982):

> The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.

On the one hand, immunity may be undesirable because "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." 457 U.S. at 814. On the other hand, immunity may be desirable in order to mitigate the social costs of unlimited liability. Such costs include the expenses of litigation, the "diversion of official energy from

pressing public issues," discouraging competent citizens from accepting public office, and the danger of excessively deterring officials from enthusiastically exercising their duties. *Id.* The application of these policies to the instant matter suggests that the First Circuit's decision should be reversed.

First, as this Court and the First Circuit have recognized, it is not desirable to leave citizens without a remedy when constitutional rights are at issue. The First Circuit assumes such will be the result if police officers are insulated by a magistrate's decision in the circumstances of this case. 748 F.2d at 720. However, the First Circuit's conclusion is based on an overly narrow interpretation of "remedy." As this Court has recently recognized, the existence of remedies outside of 42 U.S.C. § 1983 may suffice even when such remedies "may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). *Accord, Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

In the present case, remedies outside of § 1983 are available which mitigate the deleterious effects of removing the § 1983 remedy. First, liability is still possible if the officer obtains a warrant based on knowing or reckless falsity. Second, the affidavit is subject to review by the magistrate, which as this Court has recognized, cannot be presumed ineffective. *United States v. Leon, supra.* Third, as the facts of the instant matter demonstrate, the criminal proceeding will be terminated if there is a subsequent determination of no probable cause. *See also United States v. Leon, supra* (exclusionary rule).

Amici recognize that the above-listed remedies do not constitute damage remedies equivalent to that provided by § 1983. However, when the availability of at least some remedies is considered with the strong policies favoring the granting of immunity, it is evident that immunity is desirable here.

The social costs of excessive litigation in the circumstances of the instant case are apparent. In particular, society must be concerned with the possibility of excessive deterrence. The First Circuit posits that its rule will not chill officers in the exercise of their duty but will promote "the rule of law." 748 F.2d at 719. However, one might question whether the rule of law will in fact be furthered if dedicated officers are subject to "the risk of monetary liability for a misstep while endeavoring to enforce the law." *United States v. Leon*, 104 S. Ct. at 3454, n. 28 (Stevens, J., dissenting).

In addition, concern must be expressed regarding the time and energy which litigation requires and which directly subtracts from a public official's ability to fulfill his duties. The Court has recognized the severity of this problem and modified the qualified immunity standard in response. *Harlow v. Fitzgerald, supra.* In *Harlow*, the Court particularly noted the "special costs" of the subjective test formerly applied in qualified immunity analysis:

> Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 817 (footnotes omitted).

The objective standard set forth in *Harlow* anticipates that the court will determine the reasonableness of an official's conduct (and thus his entitlement to qualified immunity) "by reference to clearly established law." 457 U.S. at 818. In other words, the analysis is to be a legal one. Unfortunately, the *Harlow* standard is almost impossible to apply in Fourth Amendment cases involving probable cause because such cases, by their very nature, must be decided on a case-by-case basis. The

facts of each situation are so individual that only rarely will existing case law clearly establish that particular conduct is prohibited. *Cf. Hudson v. Palmer*, 104 S. Ct. at 3206 (O'Connor, J., concurring) ("the Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis"). Because of the difficulties of making such a determination in warrant cases, there is a particular need for an objective rule of law to guide the courts and officers in their conduct.

The First Circuit states that its standard is an objective standard consistent with *Harlow*. And, indeed, the First Circuit does adopt the language of *Harlow* in its opinion. However, as a practical matter, the First Circuit's test of "constitutional negligence" perpetuates that which *Harlow* was designed to correct—the difficulty of a case-by-case analysis requiring considerable discovery and, ultimately, trial. For it is only by extensive analysis of each individual case that it will be possible to determine whether an officer "should have known" that the facts recited in his affidavit did not constitute probable cause.

Petitioner, on the other hand, offers a truly objective rule in this case by placing the responsibility for probable cause determinations squarely with the magistrate and removing the specter of liability for police officers in such circumstances unless the officer obtained the warrant with knowing or reckless falsity. In contrast with the First Circuit's holding, this rule is completely consistent with the policies underlying qualified immunity. It will provide officers with clear guidance for conduct and will allow them to direct their energies where they should be directed, to protecting the public. In addition, placing responsibility for probable cause determinations with the magistrate puts that decision in the hands of officials who are neutral, detached and trained in the law. The result

will be exactly what the First Circuit desires, "the exercise of police power *within* the law." 74[illegible] F.2d at 719 (emphasis in original).

CONCLUSION

The instant matter provides the Court with an opportunity to address the relationship between a police officer's duty to enforce the law and his potential exposure for civil liability for executing that duty. Recent cases regarding both law enforcement and civil liability have left unanswered the question raised in this case. However, the policies underlying those cases suggest that an officer who believes the facts in his affidavit to be true, and submits the affidavit to a neutral and detached magistrate, should not be liable for civil damages when it is subsequently determined that the warrant issued by the magistrate was not supported by probable cause. For these reasons, amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Court of Appeals.

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Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
CATHARINE F. HAUKEDAHL
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-6839
Counsel for Amicus Curiae
State of Minnesota